

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PETER M. BERGNA,

Petitioner,

vs.

JAMES BENEDETTI, *et al.*

Respondents.

3:10-cv-00389-RCJ-WGC

ORDER

This represented habeas matter comes before the Court on respondents' motion (#46) to disqualify petitioner's appointed counsel.

Background

Petitioner Peter Bergna challenges his 2002 Nevada state conviction, pursuant to a jury verdict, of first-degree murder. He is serving a sentence of life with the possibility of parole after twenty years. He challenged the conviction on direct appeal and on state post-conviction review.

JoNell Thomas represented Bergna as retained counsel in the post-conviction proceedings in the state district court. Thomas represented Bergna from before the March 24, 2006, filing of the counseled state petition through the August 8, 2008, state district court order denying relief. She withdrew as counsel following the decision. The state district court initially appointed replacement counsel to represent Bergna on the state post-conviction appeal. The state supreme court order of affirmance reflects, however, that he refused representation on the appeal and instead proceeded *pro se*.

1 Petitioner's current federal habeas counsel, Megan Hoffman, was directly employed
2 by JoNell Thomas from approximately September 2005 through August 2007. Hoffman was
3 employed first as a law clerk from approximately September 2005 until May 2006. Following
4 her admission to the bar in May 2006, she thereafter worked as an associate attorney until
5 she was hired as an Assistant Federal Public Defender in August 2007. As discussed further,
6 below, however, Hoffman continued to assist Thomas – and thereafter Bergna directly – in
7 a manner relevant to this case after August 2007.

8 Hoffman assisted Thomas on Bergna's state post-conviction case as a law clerk, as
9 an associate attorney, and also as an ex-employee after moving on to the Federal Public
10 Defender. Counsel attests in her declaration (#51-1) that: (a) as a law clerk, she assisted
11 Thomas in the preparation and filing of Bergna's March 24, 2006, state petition, along with
12 conducting file review and research on the case; (b) in connection with the preparation of
13 Bergna's state petition, she also reviewed newspaper articles and television reports on the
14 case, thereafter preparing and executing an affidavit reflecting what she had observed in the
15 media reports; (c) after becoming an attorney, she continued to assist Thomas on Bergna's
16 pending state petition, conducting research and file review; and (d) she assisted Thomas at
17 the October 2007 evidentiary hearing on Bergna's state petition, which was conducted only
18 a short time after Hoffman had left Thomas' employ for the Federal Public Defender. With
19 respect to the state court evidentiary hearing, counsel attests that her "role was limited to
20 locating and organizing exhibits for Ms. Thomas, and to handling Mr. Bergna's questions."
21 She attests that she did not question any witnesses or make any strategy decisions.

22 Counsel further attests that, following her attendance at the October 2007 evidentiary
23 hearing, she "occasionally heard from Mr. Bergna via letter or telephone call," with those
24 contacts increasing "in June of 2010, as Mr. Bergna prepared to file his pro se federal habeas
25 petition."

26 In the present action, the Court granted the Federal Public Defender's motion to be
27 appointed as counsel on October 19, 2010. The Court's action was based – against the
28 backdrop of the law at that time – in part upon current counsel's familiarity with the case.

1 Subsequently, however, on March 20, 2012, the United States Supreme Court issued
 2 its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). In *Martinez*, the Court held that
 3 inadequate assistance of counsel in initial-review collateral proceedings – such as, for
 4 example, a state post-conviction proceeding in a state district court – may establish cause for
 5 a petitioner's failure to pursue a claim of ineffective assistance of trial counsel in such
 6 proceedings.

7 ***Discussion***

8 Following *Martinez*, there in truth can be no dispute that petitioner currently does not
 9 have conflict-free counsel. Following *Martinez*, competent federal habeas counsel would
 10 review the state proceedings to determine whether there were (a) possible additional claims
 11 of ineffective assistance of trial counsel that (b) were not pursued by state post-conviction
 12 counsel through inadequate assistance. Following *Martinez*, current counsel thus is placed
 13 in a position of having to review the performance of a state post-conviction litigation team on
 14 which she worked – including as an attorney – to determine whether the team inadequately
 15 failed to raise additional claims of ineffective assistance of trial counsel. The fact that no such
 16 additional claims currently are raised in the current pleadings wholly begs the question.
 17 Current counsel is under an obligation under *Martinez* to conduct such review, and she has
 18 a conflict of interest when doing so. That conflict of interest is real, actual and current.¹

19
 20
 21 ¹Counsel's arguments to the contrary are unpersuasive. Counsel's efforts also to minimize her role in
 22 the state proceedings beg the question and are unpersuasive. The Court in particular is hard pressed to
 23 believe that an attorney who filed a 137-page counseled amended petition in this matter – and who arguably
 24 represents the epitome of thoroughness in her filings in this district – merely was handing up exhibits and
 25 answering superficial questions by the client at the state post-conviction hearing without any involvement of
 26 substance. Indeed, the very *raison d'être* for counsel being pulled back into the case even after moving on to
 27 the Federal Public Defender no doubt was due to the impossibility of finding an associate who could be as
 28 well and intimately versed in the case in the short interval before the state evidentiary hearing. Moreover,
 Bergna still was looking to Hoffman – whether formally enrolled as his counsel as not – for legal counsel
 thereafter. The declaration does not negate the likely prospect that Bergna was looking to Hoffman for legal
 counsel between the October 2007 evidentiary hearing and the August 2008 state district court decision –
 and thus during the initial review collateral proceeding for purposes of *Martinez*. Counsel attests that she
 "occasionally" heard from Bergna during the overall period following the evidentiary hearing, with the contacts
 "increasing" in June 2010 as he prepared to file a federal petition following the conclusion of the state post-
 conviction appeal. In all events, however, counsel's efforts to minimize her involvement simply beg the
 question.

1 Counsel suggests the following remedy for the conflict premised upon her prior
2 representation:

3 Mr. Bergna therefore respectfully requests that this Court:

- 4 (1) appoint counsel to consult with Mr. Bergna
5 regarding the issues raised in Respondents'
6 motion to disqualify counsel; and/or
- 7 (2) hold a telephonic, ex parte conference with
8 undersigned counsel and Mr. Bergna to
9 determine whether Mr. Bergna can execute
10 a voluntary, knowing and intelligent waiver
11 any potential conflict in this matter.

12 Should this Court determine that Mr. Bergna cannot execute a
13 voluntary, knowing, and intelligent waiver of any potential conflict
14 in this matter, Mr. Bergna respectfully requests that this Court
15 appoint new counsel to represent him in this case. This Court has
16 already recognized that appointment is appropriate in this case
17 given the "relatively complex petition" and because "Petitioner
18 faces a lengthy sentence."

19 #51, at 4.

20 The counseled amended petition in this case is 137 pages long. There further are 298
21 state court record exhibits, many of which themselves consist of numerous sub-exhibits, as
22 many as 69 sub-exhibits. The index of exhibits for the 298 exhibits itself runs for 28 pages.

23 It would take a panel attorney a prohibitive number of months to become sufficiently
24 conversant with the file to competently advise petitioner regarding the conflict. More time
25 thereafter would be involved in setting the matter on the Court's heavy calendar to conduct
26 the proceeding proposed. If, at the conclusion of that proceeding, the Court ultimately found
27 that petitioner had not executed a knowing, voluntary and intelligent waiver of the conflict,
28 then a substantial number of months would be required for replacement counsel thereafter
to more thoroughly investigate the matter and possibly present additional claims.

The more prudent, expedient and efficient course – and the one most in the interests
of justice under 18 U.S.C. § 3006A(c)² – would be to appoint substitute counsel now.

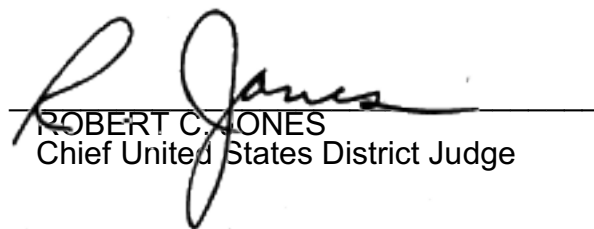
²Under 18 U.S.C. § 3006A(c), "the court may, in the interests of justice, substitute one appointed
counsel for another at any stage of the proceedings." Petitioner does not have a right to have one appointed
counsel over another. A possibly invalid waiver thus is not a necessary precondition to a substitution order.

1 Finally, the Court is not persuaded that any different action is appropriate merely
 2 because respondents did not raise the issue until nearly a year after *Martinez*. The
 3 responsibility for addressing the conflict of interest ultimately rests with petitioner's counsel
 4 in the first instance. Here, the assumptions that the Federal Public Defender – as well as this
 5 Court – proceeded on regarding the propriety of the representation were overtaken by a
 6 subsequent event, *Martinez*. The Federal Public Defender simply is going to have to take the
 7 implications of *Martinez* into account in conflict review going forward, including with regard to
 8 currently pending cases.³

9 IT THEREFORE IS ORDERED that respondents' motion (#46) to disqualify petitioner's
 10 counsel is GRANTED and that the appointment of the Federal Public Defender, appearing
 11 through Megan Hoffman, Esq., is VACATED.

12 The Clerk of Court shall forward this order to the CJA Coordinator for this Division. The
 13 CJA Coordinator shall identify a replacement panel attorney and forward their name and
 14 address to the *pro se* law clerk assigned to the file, who thereafter shall forward a draft
 15 appointment and scheduling order for the Court's review.⁴

16 DATED: July 9, 2013.

17
 18
 19
 20 
 21 ROBERT C. JONES
 22 Chief United States District Judge
 23
 24

25 ³The Court does not reach any issue as to whether the prospect that counsel potentially might be
 26 called as a witness also might provide a basis for disqualification.

27 ⁴For the sake of expediency, the Court will allow replacement counsel the option, following a conflict-
 28 free review, of incorporating the current amended petition (#13) and exhibits by reference in whole or in part
 in any additional pleadings filed, the normal operation otherwise of Local Rule LR 15-1(a) notwithstanding.